Rajasegaran v Pusat Pemulihan Serenti Raub & Anor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO 44–40 OF 2000
AUGUSTINE PAUL J
9 JUNE 2000

Preventive Detention — *Detention order — Detention under Drugs Dependants (Treatment and Rehabilitation) Act 1983 — Whether properly made — Meaning of drug dependant — Magistrate refused to follow recommendation of rehabilitation officer to order supervision of applicant under s 6(1)(b) of Drugs Dependants (Treatment and Rehabilitation) Act 1983 — Whether magistrate duty bound to give reasons for disregarding recommendation — Whether detention order should be quashed — Whether court could make additional order of supervision after quashing detention order — Courts of Judicature Act 1964 Schedule para 1*

The applicant had been ordered to be detained for a period of two years at a rehabilitation centre by the magistrate in accordance with s 6(1)(a) of the Drugs Dependants (Treatment and Rehabilitation) Act 1983 ('the Act'). The applicant filed a notice of motion praying for an order that a writ of habeas corpus be issued to the respondents to produce him before the court to be released. The rehabilitation officer in his report had recommended that the applicant be subjected to a supervision order under s 6(1)(b) of the Act. Counsel for the applicant submitted that: (i) an order may be made against a person under s 6(1) of the Act only if he is a drug dependant as defined in s 2 of the Act. As the applicant took drugs only once in a month as stated in the report of the rehabilitation officer, he was not a drug dependant. Counsel relied on *Gopinathan a/l Subramaniam v Timbalan Menteri Dalam Negeri & Ors* [2000] 1 MLJ 65 where the court held that the fact that a person takes drugs 'once in a while' means that he is not a drug dependant because it does not show a compulsion to take drugs on a continuous or periodic basis; and (ii) the magistrate, in making the order, ought to have taken into consideration the recommendation of the rehabilitation officer who had recommended a supervision order under s 6(1)(b) of the Act.

Held:

(1) The finding in *Gopinathan* cannot apply to a person who takes drugs once in a month as that amounts to taking drugs on a periodic basis within the meaning of the phrase 'drug dependant' in s 2 of the Act. The fact that the applicant was a drug dependant was further supported by the affidavit affirmed by the government medical officer. The court was satisfied that the applicant was a drug dependant as defined in the Act even though he took drugs only once a month (see p 535A–B, D).

(2) A magistrate need not necessarily follow the recommendation of a rehabilitation officer in making an order under s 6(1) of the Act. If a magistrate chooses not to follow the recommendation of a

rehabilitation officer, which he is entitled to do so, then he is duty-bound to give reasons for disregarding the recommendation. In this case, the magistrate had not given any reason for departing from the recommendation of the rehabilitation officer who, on his part, had given valid reasons to support his stand. The court agreed with the rehabilitation officer that the proper order that the magistrate ought to have made was a supervision order under s 6(1). The magistrate had therefore not acted in accordance with the law which, in normal circumstances when dealing with an application for a writ of habeas corpus, would warrant the quashing of the order of detention (see p 536E–H).

(3) It would be an injustice to society and to the applicant himself if he was discharged from the detention order without any concern for his treatment as he was a confirmed drug addict. Therefore, where a detention order made against a drug dependant under s 6(1)(a) of the Act goes beyond a technical breach, justice requires, in the interest of the drug dependant in particular and society in general, that there be a substitution of the order, when it is set aside, with one under s 6(1)(b) of the Act (see p 537G–I).

(4) Where it is necessary to grant a writ of habeas corpus, the court may make additional orders, if required, to safeguard the interests of the detanu and society. The making of the additional order is a power derived from a different provision of law and is not in the exercise of the High Court's appellate or revisionary jurisdiction (see p 541G–H).

(5) As the order made by the magistrate was wrong in law, the applicant must be released from custody. However, the fact that he was a drug dependant within the meaning of s 2 of the Act means that the jurisdiction of the court must not end with him being released. The interests of justice require positive steps to be taken to save the applicant from his social illness. This mandates the court to act under para 1 of the Schedule to the Courts of Judicature Act 1964 to mould the remedy available to the applicant to suit his requirements in accordance with law. In the circumstances, the court quashed the order of detention made by the magistrate and made an additional order of supervision for a period of three years against the applicant under s 6(1)(b) of the Act (see p 542B–D).

[Bahasa Malaysia summary

Pemohon telah diarahkan untuk ditahan untuk suatu tempoh selama dua tahun di pusat pemulihan oleh majistret menurut s 6(1)(a) Akta Penagih Dadah (Rawatan dan Pemulihan) 1983 ('Akta tersebut'). Pemohon telah memfailkan notis usul memohon perintah agar suatu writ habeas corpus dikeluarkan terhadap responden-responden untuk

mengemukakannya di hadapan mahkamah untuk dibebaskan. Pegawai pemulihan di dalam laporannya telah mencadangkan bahawa pemohon diletakkan di bawah perintah pengawasan di bawah s 6(1)(b) Akta tersebut. Peguam untuk pemohon menghujahkan bahawa: (i) suatu perintah boleh dibuat terhadap seseorang di bawah s 6(1) Akta tersebut hanya jika dia adalah seorang penagih dadah seperti yang didefinasikan di dalam s 2 Akta tersebut. Oleh kerana pemohon hanya mengambil dadah sebulan sekali seperti yang dinyatakan di dalam laporan pegawai pemulihan, beliau bukanlah seorang penagih dadah. Peguam telah bergantung kepada *Gopinathan a/l Subramaniam v Timbalan Menteri Dalam Negeri & Ors* [2000] 1 MLJ 65 di mana mahkamah memutuskan bahawa fakta bahawa seseorang mengambil dadah 'sekali-sekala' bermaksud bahawa beliau bukanlah seorang penagih dadah kerana ia tidak menunjukkan keinginan untuk mengambil dadah dalam tempoh yang berterusan atau berkala; dan (ii) majistret tersebut, di dalam membuat perintah, patutlah mengambil kira cadangan pegawai pemulihan yang telah mencadangkan perintah pengawasan di bawah s 6(1)(b) Akta tersebut.

Diputuskan:

(1) Penemuan *Gopinathan* tidak terpakai kepada seseorang yang mengambil dadah sekali sebulan kerana ia adalah terjumlah kepada mengambil dadah di dalam tempoh yang berkala di dalam maksud ayat 'penagih dadah' di dalam s 2 Akta tersebut. Fakta bahawa pemohon adalah penagih dadah telah disokong selanjutnya oleh afidavit yang diikrarkan oleh pegawai perubatan kerajaan tersebut. Mahkamah berpuas hati pemohon adalah seorang penagih dadah seperti yang didefinasikan oleh Akta tersebut walaupun beliau hanya mengambil dadah sekali sebulan (lihat ms 535A–B, D).

(2) Seorang majistret tidak semestinya mengikut cadangan pegawai pemulihan di dalam membuat perintah di bawah s 6(1) Akta tersebut. Jika seorang majistret memilih untuk tidak mengikut cadangan pegawai pemulihan, di mana beliau berhak untuk berbuat demikian, beliau kemudian mempunyai kewajipan untuk memberikan sebab-sebab untuk tidak mengendahkan cadangan tersebut. Di dalam kes ini, majistret tidak memberikan sebab untuk tidak mengikut cadangan pegawai pemulihan yang, di pihaknya, telah memberikan sebab-sebab yang sah untuk menyokong pendiriannya. Mahkamah bersetuju dengan pegawai pemulihan bahawa perintah wajar yang patut dibuat majistret adalah perintah pengawasan di bawah s 6(1). Dengan itu, majistret tidak bertindak menurut undang-undang, di mana di dalam keadaan-keadaan normal di dalam berhadapan dengan suatu permohonan writ habeas corpus, akan memerlukan pembatalan perintah penahanan tersebut (lihat ms 536E–H).

(3) Adalah tidak adil kepada masyarakat dan kepada pemohon sendiri jika beliau dilepaskan daripada perintah penahanan tanpa sebarang perhatian kepada rawatannya oleh kerana beliau disahkan seorang penagih dadah. Oleh itu, di mana suatu perintah penahanan yang dibuat di bawah s 6(1)(a) Akta tersebut telah melampaui suatu pelanggaran teknikal, keadilan memerlukan, bagi kepentingan penagih dadah secara khusus dan masyarakat secara amnya, supaya terdapat suatu perintah gantian, apabila ia diketepikan, dengan s 6(1)(b) Akta tersebut (lihat ms 537G–I).

(4) Apabila diperlukan untuk memberikan writ habeas corpus, mahkamah boleh membuat perintah-perintah tambahan, jika diperlukan, untuk menjaga kepentingan orang yang ditahan dan masyarakat. Membuat perintah-perintah tambahan adalah kuasa yang berpunca daripada peruntukan undang-undang yang berbeza dan ia bukanlah pelaksanaan bidang kuasa rayuan atau semakan Mahkamah Tinggi (lihat ms 541G–H).

(5) Oleh kerana perintah majistret adalah salah di sisi undang-undang, pemohon mestilah dibebaskan daripada penahanan. Namun demikian, fakta bahawa beliau merupakan sseorang penagih dadah di dalam maksud s 2 Akta tersebut bermaksud bahawa bidang kuasa mahkamah tidak tamat apabila beliau dibebaskan. Kepentingan keadilan memerlukan langkah-langkah positif diambil untuk menyelamatkan pemohon daripada gejala sosial. Ini memberikan mandat kepada mahkamah untuk bertindak di bawah perenggan 1 Jadual kepada Akta Mahkamah Kehakiman 1964 untuk mengubahsuai remedi yang sedia ada kepada pemohon untuk disesuaikan dengan keperluannya menurut undang-undang. Di dalam keadaan-keadaan tersebut, mahkamah membatalkan perintah penahahan yang dibuat oleh majistret dan membuat perintah tambahan berbentuk pengawasan untuk tempoh tiga tahun terhadap pemohon di bawah s 6(1)(b) Akta tersebut (lihat ms 542B–D).]

Notes

For cases on detention order generally, see 10 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1195–1327.

Cases referred to

Ang Gin Lee v PP [1991] 1 MLJ 498 (refd)
BC Chaturvedi v Union of India AIR 1996 SC 484 (refd)
Budge Budge Municipality v Mangru (1952) 57 CWN 25 (refd)
Dwarka Nath v Income Tax Officer, Special Circle D Ward, Kanpur AIR 1966 SC 81 (refd)
First Malaysia Finance Bhd, Re [1990] 1 MLJ 504 (refd)
Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors [1985] 2 MLJ 35 (refd)

Gopinathan a/l Subramaniam v Timbalan Menteri Dalam Negeri & Ors [2000] 1 MLJ 65 (refd)
Hong Leong Equipment Sdn Bhd v Liew Fook Chuan & Anor [1996] 1 MLJ 481 (refd)
Majistret, Mahkamah Majistret Rawang & Anor v Gurdeep Singh a/l Atma Singh [2000] 6 MLJ 112 (refd)
Moulvi Hamid Hassan Nomani v Banwarilal Roy (1942) II MLJ 32 (refd)
Quan Kim Hock v Timbalan Menteri Dalam Negeri & Ors [2000] 5 MLJ 65 (refd)
R Rama Chandran v The Industrial Court of Malaysia [1997] 1 MLJ 145 (refd)
Shuttleworth, Re [1846] 9 QB 651 (refd)
Ryots of Garabandha v The Zamindar of Parlakimedi ILR 1938 Mad 816 (refd)
Satyanarayanamurthi v IT Appellate Tribunal AIR 1957 Andh 123 (refd)
Sazali bin Mat Noh v Timbalan Menteri Dalam Negeri [1999] 1 MLJ 9 (refd)
State of Uttar Pradesh v Dr Vijay Anand Maharaj [1963] 1 SCR 1 (refd)
Syed Azman bin Syed Mohamed v Lian Seng (KL) Construction Co Sdn Bhd [1992] 2 MLJ 842 (refd)
Varier v Secretary to the Ministry of Home Affairs [1978] Cr LJ 86 (refd)
Venkataratnam v Secretary of State for India (1930) 1 LR Mad 979 (refd)

Legislation referred to

Constitution art 226 [India]
Drug Dependants (Treatment and Rehabilitation) Act 1983 ss 2, 6(1)(a), (b)
Drug Dependants (Treatment and Rehabilitation) (Amendment) Bill 1997 Explanatory Statement
Subordinate Courts Act 1948

Vijian Padavattan (*Vijian & Associates*) for the applicant.
Kamaludin bin Md Said (Senior Federal Counsel, Ministry of Home Affairs) for the respondents.

Augustine Paul J: Rajasegaran ('the applicant') prayed for an order, pursuant to a notice of motion dated 26 April 2000, that a writ of habeas corpus be issued to the respondents to produce him before this court to be released. The applicant had been ordered to be detained for a period of two years on 4 February 2000 by the learned magistrate, Magistrate's Court, Jalan Raja, Kuala Lumpur at the Pusat Pemulihan Serenti Raub, Pahang in accordance with s 6(1)(a) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 ('the Act'). The applicant had been certified to be a drug dependant pursuant to a certificate issued by a government medical officer in the prescribed form. In making the order the learned magistrate

had before him the report ('the report') and the recommendation ('the recommendation') of the rehabilitation officer.

In order to appreciate the argument advanced by learned counsel for the applicant in support of the motion it is necessary to reproduce certain parts of the report. The material parts read as follows:

> REKOD PENGGUNAAN DADAH/KESIHATAN
>
> 3.1 Jenis : Ganja Cara Penggunaan : Hisap
> 3.2 Kekerapan Menggunakan Dadah : 1 kali sebulan
> 3.3 Lama Menggunakan Dadah : Baru terlibat
>
> RUMUSAN DAN SYOR PEGAWAI PEMULIHAN
>
> Penama bekerja sebagai Jaga dan mempunyai kelulusan sehingga Tingkatan 3. Penama mendakwa terlibat dengan penagihan dadah jenis ganja dan masih baru lagi menagih. Cara pengambilan dengan cara hisap Penama mendakwa tidak mempunyai sebarang rekod penjara serta tiada rekod rawatan pemulihan. Mengikut semakan melalui Sistem Maklumat Dadah Kebangsaan (NADI), penama tidak mempunyai rekod.
>
> Berdasarkan kepada keadaan fizikal dan keterangan daripada penama dapatlah dikategorkan sebagai penagih ringgan terurus. Penama juga merupakan penangung utama kepada keluarga yang mempunyai empat orang anak dengan isteri yang tidak bekerja. Keadaan fizikal penama masih lagi terurus kerana masih baru terlibat dengan penggunaan dadah. Hasil daripada siasatan yang telah dibuat didapati penama telah dapat membuktikan kesungguhan untuk memulihkan diri dalam komuniti. Ini juga disokong dengan dorongan daripada keluarga terutamanya isteri disamping mempunyai pekerjaan yang tetap yang mana kedua-dua elemen ini amat penting bagi membantu dalam proses pemulihan dalam komuniti. Maka penama adalah disyorkan diberi pemulihan di bawah peruntukan s 6(1)(b) dan sub-s 6(2) Akta Penagih Dadah (Rawatan dan Pemulihan) 1983 (Pindaan 1998).

It must be observed immediately that the recommendation made is that the applicant be subjected to a supervision order under s 6(1)(b) of the Act based on the grounds that he can manage to look after himself as he became an addict only recently; is interested in wanting to rehabilitate himself; and his family is supportive of him. The rehabilitation officer went on to state that the family support given to the applicant is a very important element in the rehabilitative process. Learned counsel's first submission, and correctly stated, is that an order may be made against a person under s 6(1) of the Act only if he is a drug dependant. He then referred to s 2 of the Act which defines a 'drug dependant' as:

> ... a person who through the use of any dangerous drug undergoes a psychic and sometimes physical state which is characterized by behavioural and other responses including the compulsion to take the drug on a continuous or periodic basis in order to experience its psychic effect and to avoid the discomfort of its absence.

Learned counsel submitted that as the applicant takes drugs only once in a month as stated in the report he is not a drug dependant as defined in s 2 of the Act. In support of his argument he referred to *Gopinathan a/l*

Subramaniam v Timbalan Menteri Dalam Negeri & Ors [2000] 1 MLJ 65 where I had held that the fact that a person takes drugs 'once in a while' means that he is not a drug dependant because it does not show a compulsion to take drugs on a continuous or periodic basis. In my opinion this finding cannot apply to a person who takes drugs once in a month as that amounts to taking drugs on a periodic basis within the meaning of the phrase 'drug dependant' in s 2 of the Act. The fact that the applicant is a drug dependant is further supported by the affidavit affirmed by the government medical officer in reply to the motion filed by the applicant. Paragraph 5 of the affidavit reads as follows:

> Saya sesungguhnya menyatakan bahawa setelah menjalankan semua pemeriksaan, pemerhatian dan ujian-ujian yang perlu, saya telah berpuashati bahawa Pemohon adalah seorang penagih dadah mengikut pengertian s 2 Akta tersebut. Hasil ujian ke atas spesimen air kencingnya mendapati ada mengandungi CANNABIS. Ini membantu saya membuat kesimpulan bahawa Pemohon adalah penagih dadah jenis CANNABIS.

I was therefore satisfied that the applicant was a drug dependant as defined in the Act even though he took drugs only once in a month. Learned counsel then proceeded to submit that the learned magistrate, in making the order, ought to have taken into consideration the family background of the applicant and the recommendation. He added that in the circumstances the proper order to have been made ought to have been a supervision order under s 6(1)(b) of the Act as recommended by the rehabilitation officer.

That leads to a consideration of whether a magistrate may depart from a recommendation made by a rehabilitation officer on the appropriate order to be made. In an attempt to answer the question I consider it necessary to reproduce s 6(1) of the Act. It reads as follows:

> Where a person who has undergone the tests referred to in s 3 or 4 and, in consequence of such tests, is certified by a government medical officer or a registered medical practitioner to be a drug dependant, the officer shall produce him, or cause him to appear before a Magistrate, and the Magistrate shall upon the recommendation of a rehabilitation officer and after giving such person an opportunity to make representations —
>
> (a) order such person to undergo treatment and rehabilitation at a rehabilitation centre specified in the order for a period of two years and thereafter to undergo supervision by an officer at the place specified in the order for a period of two years; or
>
> (b) order such person to undergo supervision by an officer at the place specified in the order for a period of not less than two and not more than three years.

I had the occasion to consider s 6(1) of the Act in some detail in *Gopinathan* and said at p 76:

> A reading of the section reveals that upon a consideration of the recommendation a magistrate shall make one of two orders. This makes it patent that in making one of the two orders the magistrate is not bound to follow the recommendation of the rehabilitation officer. This means that, if the rehabilitation officer recommends an order under sub-s 1(a), the

magistrate has the discretion to make an order under sub-s 1(b) of the section and vice versa. This results in the recommendation being ignored by the magistrate in an appropriate case. The recommendation made by the rehabilitation officer is therefore not conclusive.

However, in *Quan Kim Hock v Timbalan Menteri Dalam Negeri & Ors* [2000] 5 MLJ 65 it was held that a magistrate, in making an order under s 6(1) of the Act, must follow the recommendation of the rehabilitation officer. If the magistrate must make the recommended order then I do not see the necessity of giving an opportunity to a person under s 6(1) of the Act to make representations before an order is made against him. If the magistrate does not have the discretion to make the appropriate order based on the representation made, which may even include not making any order at all as in *Gopinathan*, then the right to make representations would be nothing but an empty rigmarole. I pause to add that the learned judge in *Quan Kim Hock* felt compelled to make the ruling based on the language employed in the Explanatory Statement to the Drug Dependants (Treatment and Rehabilitation) (Amendment) Bill 1997. It is sufficient for me to refer to cases such as *Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors* [1985] 2 MLJ 35, *Re First Malaysia Finance Bhd* [1990] 1 MLJ 504 and *Syed Azman bin Syed Mohamed v Lian Seng (KL) Construction Co Sdn Bhd* [1992] 2 MLJ 842 where it was held that it is not permissible to rely on the explanatory statement in a bill to interpret a provision in a statute. I would therefore still hold the view that a magistrate need not necessarily follow the recommendation of a rehabilitation officer in making an order under s 6(1) of the Act. Notwithstanding what I have said it is my further view that ordinarily a magistrate must follow the recommendation made by virtue of the special position and expertise of the rehabilitation officer in cases of this nature. If indeed a magistrate chooses not to follow the recommendation of a rehabilitation officer, which he is entitled to do so, then he is duty-bound to give reasons for disregarding the recommendation. This is necessary as the rehabilitation officer himself gives reasons for his recommendation, as in this case, and the magistrate must, on his part, explain himself for departing from the recommendation. This must be reflected in the notes of proceedings.

In this case the learned magistrate has not given any reason for departing from the recommendation of the rehabilitation officer who, on his part, has given valid reasons to support his stand. I agree with the recommendation made by the rehabilitation officer and feel that the proper order that the learned magistrate ought to have made was a supervision order under s 6(1)(b) of the Act. The learned magistrate has therefore not acted in accordance with law which, in normal circumstances when dealing with an application for a writ of habeas corpus, would warrant the quashing of the order of detention. However, before proceeding to do so I found it necessary to be guided by the object of a detention order under the Act. In this regard I can do no better than refer to the judgment of Kang Hwee Gee J in *Majistret, Mahkamah Majistret Rawang & Anor v Gurdeep Singh a/l Atma Singh* [2000] 6 MLJ 112 where his Lordship said at pp 122–123:

> There are compelling reasons why preventive detention of the subject by the executive is subject to close judicial scrutiny ... On the other hand the objective of a detention under s 6 of the Drug Dependants (Treatment and Rehabilitation) Act 1983 is not preventive; rather, it is rehabilitative and undertaken primarily for the well-being of the drug dependant himself — the detention being merely incidental to achieving that purpose — a means to an end. It is therefore a social legislation and in view of the prevalence of drug abuse in the country, urgent and necessary.
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> A rehabilitative detention (as opposed to preventive detention) clearly therefore does not encroach into 'the realm of the liberty of the subject' as envisaged in *Re Dato' James Wong*. There would accordingly, be less need to keep such high vigilence as one would in preventive detention cases.
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> To apply the same stringent criteria to issue habeas corpus against a rehabilitative detention order made by a magistrate under the Act as one would in preventive detention made under special powers would undermine its social objective of treating and rehabilitating drug dependants — an act which this court must refrain from doing unless the order is from the objective stand point legally unsustainable.

His Lordship has therefore expressed the view, and with which I wholly and readily agree, that a rehabilitation order under the Act should not be invalidated on merely technical grounds bearing in mind the object of the Act. As a matter of fact this reasoning is supported by the fact that the court has an inherent jurisdiction to ignore a defect in a detention order where it appears that the detenu is a person who, on the merits, ought to be detained (see *The Law of Habeas Corpus* by RJ Sharpe (2nd Ed) at p 57). This principle is illustrated by cases involving persons confined on account of mental disorder. As Lord Denman CJ said in *Re Shuttleworth* (1846) 9 QB 651 at p 662:

> If the court thought that a party, unlawfully received or detained, was a lunatic, we should still be betraying the common duties of members of society if we directed a discharge. But we have no power to set aside the order, only to discharge. And should we, as Judges, or individuals, be justified in setting such a party at large? It is answered that there may be a fresh custody. But why so? Is it not better, if she be dangerous, that she should remain in custody till the Great Seal or the commissioners act? Therefore, being satisfied in my own mind that there would be danger in setting her at large, I am bound by the most general principles to abstain from so doing; and I should be abusing the name of liberty if I were to take off a restraint for which those who are most interested in the party ought to be the most thankful.

By parity of reasoning I am of the view that it would be an injustice to society and to the applicant himself if he is discharged from the detention order without any concern for his treatment as he is a confirmed drug addict. Where, therefore, a detention order made against a drug dependant under s 6(1)(a) of the Act goes beyond a technical breach, justice requires, in the interest of the drug dependant in particular and society in general, that there be a substitution of the order, when it is set aside, with one under s 6(1)(b) of the Act. It is perhaps for this reason that learned counsel graciously agreed that the appropriate order to be made against the applicant would be a supervision order under s 6(1)(b) of the Act. But to

make such an order in the motion before me, being an application for habeas corpus, is confronted with legal hurdles. One way in which I could make the supervision order against the applicant is through the exercise of my powers of revision to alter the order made by the learned magistrate. It must however be noted that the power to detain a person under the Act is not vested in a court of law but in a magistrate. A magistrate is not synonymous with a magistrate's court under the Subordinate Courts Act 1948 and the power given to a magistrate under s 6(1)(a) of the Act is not provided for by the Subordinate Courts Act 1948 (see *Sazali bin Mat Noh v Timbalan Menteri Dalam Negeri* [1999] 1 MLJ 9). Thus in *Ang Gin Lee v PP* [1991] 1 MLJ 498 the (then) Supreme Court emphatically ruled that an order made by a magistrate under s 6(1) of the Act is neither appealable nor may the High Court revise or review the order in the exercise of its inherent jurisdiction. That may appear to preclude the court from making any other order when ordering a detanu to be released. Fortunately this does not mean that the court is powerless to make any further order in the interests of justice. As Hashim Yeop Sani CJ (Malaya) said in that case at p 501:

> It was perhaps realizing this aspect of the legislation that the learned judge in this case suggested that if the applicant was dissatisfied with the order of the magistrate he should look elsewhere for reliefs. In other words if any person is dissatisfied with the order of the magistrate under that provision of the law because of some irregularity he should have access to the High Court but not through the appeal process. This judgment merely lays down the law that according to existing provisions of the law there is no appeal to or revision by the High Court from the order of the magistrate under s 6 of the Act.

It will therefore be observed that the (then) Supreme Court has left open the doors of justice to find an avenue to resolve the legal impasse in cases of this nature. With this in mind I turn to the Schedule to the Courts of Judicature Act 1964. It is entitled 'Additional Powers' and as Edgar Joseph Jr FCJ said in *R Rama Chandran v The Industrial Court of Malaysia* [1997] 1 MLJ 145 at p 195:

> The Schedule is entitled 'Additional Powers' and this suggests powers over and above those already enjoyed by the High Court.

What is relevant in the Schedule is its para 1 ('para 1') which reads as follows:

> Power to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.

Paragraph 1 is similar to art 226 of the Indian Constitution. In commenting on these two provisions Gopal Sri Ram JCA, in laying the groundwork for changing the face of public law remedies in this country, said in *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan & Anor* [1996] 1 MLJ 481 at pp 543–544:

A It follows that, because of the close resemblance in the language of these two provisions — para 1 of the Schedule and art 226 of the Indian Constitution — — the decisions of Indian courts upon the analagous provision are to be accorded greater weight when determining the width of the power conferred by the paragraph, than decisions of courts in those jurisdictions where the equipollent provision is absent. These jurisdictions include England, B Australia, New Zealand and Canada.

Second, it is to be noted that the paragraph primarily deals with public law concepts and public law remedies. The reference to 'any authority', which is a term commonly used in public law, and to the remedies of 'habeas corpus, mandamus, prohibition, quo warranto and certiorari', all of which are public law remedies, reasonably supports this view.

C Third, it is plain that Parliament intended that the High Court should be empowered to grant relief which is ordinarily beyond the scope of the usual public law remedies. That intention finds expression in the word 'including' which has been interposed between the phrase 'directions, orders or writs' and the phrase 'writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others'. So too, the phrase 'or for any other D purpose', with which the paragraph concludes, makes clear the wide area in which the remedies are to operate. These matters, in my judgment, reflect the conferment of a wide power upon the High Court in the matter of public law remedies.

Consequently, the power of the High Court in the field of public law remedies is not confined to the grant of usual prerogative orders known to E English law. Our courts should not consider themselves to be fettered by those antiquated shackles of restrictive traditionalism which the common law of England has imposed upon itself. They are at liberty to develop a common law that is to govern the grant of public law remedies based upon our own legislation. They may, of course, be guided by the decisions of courts of a jurisdiction which has an analogous provision. But ultimately, they must F hearken to the provisions of our own written law when determining the nature and scope of their powers.

In my judgment, the wide power conferred by the language of para 1 of the Schedule enables our courts to adopt a fairly flexible approach when they come to decide upon the appropriate remedy that is to be granted in a particular case. The relief they are empowered to grant is by no means to be G confined within any legal straightjacket. They are at liberty to fashion the appropriate remedy to fit the factual matrix of a particular case, and to grant such relief as meets the ends of justice.

Let me illustrate. Assume for a moment that an award of the Industrial Court upholding the dismissal of a workman is quashed by certiorari. The ordinary course — and this is the course that would be taken by an English H court — would be to remit the matter to the Industrial Court by way of mandamus to compel it to rehear the case. But the resultant delay and the inevitable result in the workman's favour may well be compelling factors to justify the award of relief by the High Court.

In a proper case, I envisage no impediment to the High Court making the appropriate determination and awarding fair compensation to the workman. I In such cases, it is difficult to see what possible good could come out of prolonging the agony of the parties to the dispute by delaying the matter and adding to the cause list of an already overworked tribunal.

Hong Leong Equipment Sdn Bhd was followed by the Federal Court in *Rama Chandran* where Edgar Joseph FCJ said at p 196:

> There are dicta in a wealth of Indian case law, the effect of which is, that the powers of the High Court conferred by art 226 are not limited to issuing prerogative writs but extends so far as to enable the court to issue any appropriate order of direction (see eg *Jashingbhai v Dist Magistrate, Ahmedabad* AIR 1950 Bom 363, (1950) 52 Bom LR 544; *Ramcharan Lal v The State of UP* [1953] 1 All 251, AIR 1952 All 752; *Prabhawati Devi v Dist Magistrate* AIR 1952 All 836; *Chhotabhai Jethabhai Patel & Co v Union* [1952] Nag 156; *Amardas v Pepsu* (1953) Pep 63; *Krishnankutty v Trav Cochin* AIR 1951 Tr C 197; *B Parraju v Gen Manager, BN Rly* AIR 1952 Cal 610). Though these dicta are in the nature of general observations, they cannot be disregarded out of hand.
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> There are also Indian Supreme Court authorities which strongly support the proposition that the power of the courts there, in the field of Public Law remedies, is not limited, as in England, but much wider, so much so, that in certain circumstances, they have the power to review the decision of the authority on the merits and mould the relief according to the exigencies of the situation in order to satisfy the insistent demands for justice (see eg *State of Madhya Pradesh v Bhailal Bhai* AIR 1964 SC 1006; *Dwarka Nath v Income Tax Officer* AIR 1966 SC 81; *Behari Lal Baldeo Prasad v Commissioner Jhansi Division* (1967) 63 ITR 555; *Hindustan Steel Ltd Rourkela v Roy* AK AIR 1970 SC 1401 at p 1407; *Variety Emporium v Mohd Ibrahim* AIR 1985 SC 207 at p 210).

And at p 189:

> In India, in *Ranjit Thakur v Union of India* AIR 1987 SC 2386, a case where the quantum of punishment imposed by a court martial was in issue, Venkatchalia J speaking for the Supreme Court said this (at p 2392):
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> > ' ... The doctrine of proportionality, as part of the concept of Judicial Review would ensure that even on all aspect which is otherwise within the exclusive province of the court martial, if the decision of the court even as to sentence is an outrageous defiance of logic, then the sentence should not be immune from correction.'

Thus, as Eusoff Chin CJ said in that case, it was ' ... a fit and proper case where the jurisdiction of the court should not end with the quashing of the Award' (at p 184) and, accordingly, consequential relief was ordered. I also refer to *BC Chaturvedi v Union of India* AIR 1996 SC 484 where Ramasamy J said at p 489:

> The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/ appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof.

The high authorities that I have referred to make it patent that the public law remedies, which include habeas corpus, may be moulded to fit the

A factual matrix of a particular case to grant such relief as meets the ends of justice. The further power conferred by para 1 to issue any directions or orders means that under the law the orders that can be made on a motion for a writ of habeas corpus are very wide. This view is also supported by the words used in para 1 itself. It refers to writs ' ... of the nature of habeas corpus ... .' This means that a writ of habeas corpus need not be equated with its English counterpart, a point recognized by the Federal Court in *Rama Chandran* (at p 197). In this regard I refer to *Varier v Secretary to the Ministry of Home Affairs* (1978) Cr LJ 86 where Subramanian Poti J said at p 101:

> That a writ of habeas corpus need not be equated with its counter-part in England, though analogy may be drawn from it, is a principle well established. The power of the High Court to mould reliefs to suit the requirements has been recognized by the *Supreme Court of India in Dwarka Nath v Income Tax Officer, Special Circle D Ward, Kanpur* (AIR 1966 SC 81). The court said (at pp 84–85):
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> > '... but the scope of those writs also is widened by the use of the expression 'nature', for the said expression does not equate the writs that can be issued in India with those in England. That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. It enables the High Courts to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under art 226 of the Constitution with that of the English courts to issue prerogative writs is to introduce the necessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of Government to a vast country like India functioning under a federal structure'.

It follows that in making an order on a motion for a writ of habeas corpus the High Court is empowered by para 1 to mould the remedy in order '... to reach injustice wherever it is found' (see *Dwarka Nath v Income Tax Officer, Special Circle D Ward, Kanpur* AIR 1966 SC 81). In fact, as Edgar Joseph Jr FCJ said in *Rama Chandran* at p 197:

> On the other hand, having regard to the rapidly developing law in applications for Judicial Review, whenever legally permissible, we must demonstrate a willingness to mould the remedies available to suit the justice of the case.

The corollary is that where it is necessary to grant a writ of habeas corpus the court may make additional orders, if required, to safeguard the interests of the detanu and society. This would assume prominence in drug cases which is a grave social evil in this country. I must add without any hesitation that the making of the additional order is a power derived from a different provision of law and is not in the exercise of the High Court's appellate or revisionary jurisdiction. In this regard reference may be made to *State of Uttar Pradesh v Dr Vijay Anand Maharaj* [1963] 1 SCR 1 where, in following cases such as *Venkataratnam v Secretary of State for India* (1930) 1 LR Mad 979, *Ryots of Garabandha v The Zamindar of Parlakimedi* ILR 1938 Mad 816, *Moulvi Hamid Hassan Nomani v Banwarilal Roy* [1942] MLJ 32, *Budge Budge Municipality v Mangru* (1952) 57 CWN 25 and *Satyanarayanamurthi*

v IT Appellate Tribunal AIR 1957 Andh 123, it was held that the power exercised by the High Court under art 226 of the Indian Constitution, similar to our para 1, is an extraordinary original jurisdiction and not its appellate or revisionary power. Thus any additional order made in this case would harmonize with *Ang Gin Lee* and not conflict with it. It would, as a matter of fact, promote justice in view of the absence of a power under the ordinary jurisdiction of the High Court to rectify an irregular order made under s 6(1) of the Act.

As the order of detention made by the learned magistrate in this case is wrong in law the applicant must be released from custody. However, the fact that he is a drug dependant within the meaning of s 2 of the Act means that the jurisdiction of the court must not end with him being released. The interests of justice require further positive steps to be taken to save the applicant from his social illness. This mandates the court to act under para 1 to mould the remedy available to the applicant to suit his requirements in accordance with law. In the circumstances I quashed the order of detention made by the learned magistrate and made an additional order of supervision for a period of three years against the applicant under s 6(1)(b) of the Act. I made the order myself instead of ordering the learned magistrate to do so in order to save time and to enable the supervision order to take effect as soon possible.

Order accordingly.

Reported by Jafisah Jaafar